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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 234

PAUL GINSBURG, Petitioner,

v.

HORACE STERN and PATRICK N. BOLSINGER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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INDEX TO PETITION

	PAGE
Petition for Writ of Certiorari	1
No Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	4
Statement of the Case	5
Reasons Relied on for the Allowance of the Writ	10
I. The Judgment Sought To Be Reviewed Enters A Conflict With Decisions Of The Instant And Other Courts Of Appeals On The Same Matter, And With Applicable Decisions Of This Court On A Federal Question	10
II. This Is A Cause Of Public Importance	11

INDEX TO APPENDIX

Judgment sought to be reviewed	1
Order Denying Rehearing	2

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Third Circuit to review its Judgment (App. 1) in appeal No. 14,137 dated and entered on March 5, 1963; and its Order Denying Rehearing (App. 2) dated and entered on March 27, 1963.

Jurisdiction.

NO OPINIONS BELOW

In the United States District Court for the Western District of Pennsylvania at Civil Action No. 12,643 the Memorandum Order (3 CCA App. 7a) appealed from was not accompanied by an opinion, and is not reported. The Judgments of the United States Court of Appeals for the Third Circuit (App. 1 and 2) sought to be reviewed herein were unaccompanied by an opinion and not reported.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A., Section 1254 (1); and the general supervisory power of this Court over lower Federal Courts.

The Judgment sought to be reviewed (App. 1) was dated and entered March 5, 1963. The Order of the Court of Appeals denying the timely Petition for Rehearing was dated and entered March 27, 1963. The time for filing this petition for writ of certiorari, therefore, expires June 25, 1963.

QUESTIONS PRESENTED

1. Is not a litigant entitled to notice and the right to be heard in advance of judgment, pursuant to the Due Process of Law Clause of the Fifth Amendment to the Constitution of the United States?

2. When it is a matter of record that judgments have been entered against a litigant without notice and the right to be heard thereon, and when attachment execution proceedings likewise without notice have been had thereon, has not the victimized litigant been deprived of property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States?

3. When unallowable costs for printing are taxed against the unsuccessful appellant in the Court of Appeals by the Clerk instead of by the Court, pursuant to appellees' unserved Bills of Costs, and the amounts thereof are inserted in the Mandate by the Clerk of the Court without notice to or knowledge of the appellant and thus in violation of that Court's Rules providing for proof of service before filing and the right to be heard by the Court on allowability of costs in advance of the taxing and insertion in the Mandate; following which the Clerk of the District Court entered Judgments based thereon still without notice, pursuant to which the defendants then proceeded with attachment of plaintiff's bank accounts, with the result that plaintiff was taken by surprise, without knowledge of any of said proceedings until after the attachment of his bank accounts; have not such Judgments been entered through fraud and misconduct of adversaries and have not the refusals

of the District Court and the Court of Appeals to consider and adjudicate motions to vacate those Judgments pursuant to F.R.C.P. Rule 60 (b) resulted in deprivations of property without due process of law (1) conflicting with decisions of the instant and other Courts of Appeals on the same matter, (2) conflicting with applicable decisions of this Court on a federal question and (3) so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

4. Should not this Honorable Court reverse the Judgment sought to be reviewed, or at least remand the cause with directions that the issues involved be adjudicated on the merits, when it is patent as a matter of record that the issues involved have never been adjudicated in the lower Courts and that the decisions of the lower Courts are clearly erroneous?

CONSTITUTIONAL PROVISIONS INVOLVED

The provision of the Constitution of the United States involved herein is the Fifth Amendment, the pertinent portion of which (U.S.C.A., Constitution, Amendments 1 to 13, p. 172) is as follows:

"Amendment V. Due Process of Law . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law: . . ."

STATEMENT OF THE CASE

The petitioner, Paul Ginsburg, seeks a review in this Honorable Court of a Judgment (App. 1) of the Court of Appeals for the Third Circuit dated and entered March 5, 1963, in Appeal No. 14,137, whereby "It is ORDERED that appellees' motion for an order directing appellant to pay a reasonable fee to defendants' counsel by way of a penalty, be and it is hereby denied. It is Further ORDERED that the appeal in the above case be and it is hereby dismissed." The Appeal was from a Memorandum Order (3 CCA App. 7a) of the United States District Court for the Western District of Pennsylvania dated and entered the 13th day of April, 1962. By the said Memorandum Order, Chief District Judge Wallace S. Gourley refused the plaintiff's unanswered Motion for Hearing and to Open and Vacate Judgments (3 CCA App. 6a).

The respondents' Motion to Dismiss Appeal had misrepresented to the Court of Appeals that it was barred by *res judicata*, in the face of a record which made it manifest that the issues involved had never been adjudicated and thus were incapable of becoming the subject of the doctrine of *res judicata*. Your petitioner's Answer to Motion to Dismiss Appeal showed that "Procedurally, the appellees' Motion to Dismiss Appeal fails to conform to the Rules and the accepted practice applicable to motions; and substantively, the Motion to Dismiss Appeal is wholly without merit and should be dismissed".

The petitioner's Answer also made it plain, *inter alia*, that so far as your petitioner is concerned, this litigation was terminated years ago, until he was improperly and illegally transformed into an unwilling defendant. This cause originally was commenced against the respondents, as defendants, for their unlawful and un-

constitutional violations of your petitioner's constitutional and civil rights. In commencing the action in the District Court your petitioner as a plaintiff relied upon not only the law of the Third Circuit as pronounced by Chief Judge Biggs of that Court in the case of *Picking v. Pennsylvania R. Co., et al.*, 151 F. 2d 240, rehearing denied 152 F 2d 753 (1945), and concurred in by Chief Judge Gourley of the District Court, but also the Law of the Land as pronounced by this Honorable Court. The said Chief Judges of the lower Courts, however, reversed themselves when confronted with the instant action against these respondents. Chief Judge Wallace S. Gourley of the District Court repeatedly decided that he had no jurisdiction over the subject matter, although he had repeatedly held that the actions of these respondents against your petitioner were "violative of the basic concepts of justice". Chief Judge John Biggs, Jr., and the Associate Judges of the Court of Appeals likewise repeatedly refused to review and reverse, or remand with instructions.

After your petitioner had spent much valuable time and money in his meritorious but unsuccessful attempts to be heard on the merits of his just claims, he abandoned the proceedings.

On August 13, 1958, after your petitioner had abandoned this cause, he was surprised with service by the U. S. Marshal of attachment execution proceedings whereby all of his accounts with the Mellon National Bank and Trust Company had been attached without any notice whatever. The attachment was based upon Judgments in the amount of a few hundred dollars which were void for fraud and misconduct of adversaries.

The fraud and misconduct consisted of the respondents' taxing unallowable costs in the Court of Appeals,

the Bills of Costs for which were filed by the Clerk without the required proof of service, followed by the Clerk's inserting those amounts in the mandates, with the result that the District Court Clerk entered them as Judgments against your petitioner.

After the aforementioned secret activities had taken place, your petitioner naturally proceeded with a Motion Under F.R.C.P. Rule 60(b) to have the Judgments opened and vacated, but the learned Chief District Judge Gourley declined jurisdiction. The Court of Appeals likewise refused to go into the merits of the fraud and misconduct resulting from the illegal taxing of unallowable costs done without petitioner's right to be heard thereon by that Court.

The results of these lower Court decisions manifested only that your petitioner had become a litigant without a Court. The Chief Judges and the Judges of the lower Courts tried to imply sanction of their indecisions by reason of this Honorable Court's refusal to review, although they were well advised that it had been repeatedly pronounced by the Chief Justice and Justices of this Honorable Court that its denial of certiorari does not imply approval of the Judgment sought to be reviewed or of its supporting Opinion.

Your petitioner, being justified in arguing that unadjudicated issues as herein are always still ripe for adjudication as herein, presented in the District Court his Motion for Hearing and to Open and Vacate Judgments (3 CCA App. 6a).

The purpose of the Motion for Hearing and to Open and Vacate Judgments was to obtain a hearing on the validity of Judgments entered against the plaintiff and against the Mellon National Bank and Trust Company,

Garnishee, and in favor of the defendants, and thereupon to open and vacate all of the said Judgments pursuant to F.R.C.P. Rule 60(b) for fraud and misconduct of plaintiff's adversaries; and also for being entered in violation of plaintiff's right under the Constitution and laws of the United States. *It is a matter of record that the plaintiff (petitioner herein) never had a single hearing thereon in any Court prior to or since the entry of the said Judgments.*

It is evident from the Memorandum Order (3 CCA App. 7a) of the learned District Judge that he thought there had been an adjudication and thus declined "to attempt to reopen the proceeding at this late date". This conclusion of the juris[illegible] however, conflicted with his prior refusals to entertain a motion under F.R C.P. Rule 60(b) on the sole ground of lack of jurisdiction; and with the prior refusals of the Court of Appeals to review and reverse, or even remand with directions to assume jurisdiction and enter an adjudication on the merits.

The printed Brief for Appellant and Appendix filed in the Court of Appeals (nine extra copies of which are lodged herein for the use of the Court), contains four fully supported arguments (pp. 5-8), as follows: (I) The Judgments Entered In The Lower Court Could Not Legally Have Been Based Upon The Mandate Of This Court In Appeal No. 13,598 Or Prior Mandates, As They Were Not Within The Compass Of The Mandates; (II) District Court Judges Are Not Only Bound By The Federal Rules Of Civil Procedure As By An Act Of Congress, Which Required Chief District Judge Gourley To Proceed Under Rule 60 (b); But They Are Also Bound By The Constitution Of The United States, Requiring The Court To Proceed With A Hearing In Advance Of Judgment; (III) This Court's Attempted Affirmance At No.

13,598 Of Chief District Judge Gourley's Claim That He Was Without Jurisdiction To Conduct A Hearing Is Of No Legal Consequence; (IV) The Costs Taxed Against Appellant By The Clerk Of This Court Were Not Allowable And The Judgments Based Thereon Are Void.

The printed Petition for Rehearing filed in the Court of Appeals (nine extra copies of which are lodged herein for the use of the Court), showed that the unsupported and insupportable typewritten Motion to Dismiss Appeal was not presented in the Court of Appeals until after the service and filing of the printed Brief for Appellant and Appendix (p. 1); that the Order of the Court of Appeals dismissing the Appeal could not be supported on the facts and the applicable law; and that (p. 5) although your petitioner agreed that there should be an end to litigation, it was respectfully submitted that the end should be a legal one only.

The denial of that Petition for Rehearing gave proof positive that both of the lower Courts are absolutely determined that so far as they are concerned, your petitioner will never be afforded his right to be heard on the issue of fraud and misconduct in the procurement of those void Judgments. *Wherefore, the only forum in which your petitioner has a chance of securing the protection and enforcement of his constitutionally guaranteed right to due process of law is herein.*

It has been well established in the Federal System that a litigant is entitled to two chances—the first in the District Court, and the second in the Court of Appeals. *It is obvious from the foregoing that your petitioner never had a single chance in either of the lower Courts, with the result that this Honorable Court actually has become petitioner's Court of first and only chance.*

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. The Judgment Sought To Be Reviewed Enters A Conflict With Decisions Of The Instant And Other Courts Of Appeals On The Same Matter, And With Applicable Decisions Of This Court On A Federal Question.

The federal question involved concerns a litigant's right to due process of law pursuant to the provisions of the Fifth Amendment to the Constitution of the United States, and particularly notice and the right to be heard in advance of judgment. Also involved is the litigant's right to the equal protection and enforcement of the Federal Rules of Civil Procedure, particularly Rule 60 (b).

Even more serious in the instant cause, has been the inability of your petitioner to obtain any adjudication whatever in either of the lower Courts on the merits of any of the issues involved. No circumstance could be more of a hindrance and obstacle in the way of the constitutional path to due process of law.

It is patent from the Records that after the lower Courts sanctioned the entry against your petitioner of fraudulent Judgments which were void for having been entered in advance of notice and the right to be heard thereon, and which would have been void even if entered after notice and the right to be heard thereon being for unallowable costs, those Courts then refused petitioner's right to have proceeded to open and vacate them under Rule 60 (b).

Compounding the foregoing issues and petitioner's unwarranted problems resulting therefrom, there has

never been a single adjudication on the merits of any of the issues. In the face of such Records, the Judgment (App. 1) sought to be reviewed, whereby the Appeal was erroneously dismissed on Motion, was ill founded on the doctrine of *res judicata. It is elementary that a mere decision is not an adjudication;* and that nothing but an adjudication can become the basis for invoking the doctrine of *res judicata*. This elementary proposition in and of itself makes it plain that the Judgment sought to be reviewed is clearly erroneous.

If the judgment sought to be reviewed does not enter a conflict with decisions of the instant and other Courts of Appeals on the same matter, and with applicable decisions of this Honorable Court on a federal question, it certainly should.

II. This Is A Cause Of Public Importance.

The Judgment sought to be reviewed, if not reversed, could adversely affect the constitutional and legal rights of all. The personal and professional detriment to your petitioner is incidental to that of the public. If the instant deprivations of property without due process of law can be inflicted upon an experienced member in good standing of the Bar of this Honorable Court like your petitioner, then they could be visited upon anybody. Thus it is respectfully submitted that this Petition is not the sort of application for relief which this Honorable Court might view as a matter personal only to your petitioner; but rather as a matter generally disaffecting the constitutional and legal rights of the public and, therefore, requiring a reversal by this Honorable Court.

When at the outset attachment execution proceedings were had against the petitioner based upon fraudulent Judgments entered for unallowable costs in advance of notice and the right to be heard, the situation then involved only an attorney and a Clerk. After knowledge of the situation, however, when your petitioner proceeded under the Rules and accepted practice to protect himself and his property from these damaging assaults, it then became a matter for the Federal Courts.

The District Court made a decision, but not an adjudication, that it was without jurisdiction. That decision was affirmed by the Court of Appeals which likewise declined jurisdiction. Repeatedly the District Court and Court of Appeals had declined jurisdiction or any consideration on the merits whatever, to the point where they all thought that the issues involved had finally become *res judicata*. Consequently your petitioner has never actually been afforded his right to a Day in Court, and as a result he has been seriously deprived of professional and personal property without due process of law.

Such actions of the lower Courts so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Otherwise, there can be no question that such unconstitutional practices will continue and disaffect the citizenry's legal and constitutional rights to which they, the people, are entitled.

Respectfully submitted,

PAUL GINSBURG
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Carlton House, 550 Grant Street,
Pittsburgh 19, Pennsylvania

APPENDIX

Order of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14137

PAUL GINSBURG, Appellant
v.
HORACE STERN and PATRICK N. BOLSINGER

Present:
BIGGS, Chief Judge, and MCLAUGHLIN, Circuit Judge,
and SHERIDAN, District Judge.

Upon consideration of the motion by appellees, and of the answer filed by appellant, and after hearing appellant,

It is ORDERED that appellees' motion for an order directing appellant to pay a reasonable fee to defendants' counsel by way of a penalty, be and it is hereby denied.

It is Further ORDERED that the appeal in the above case be and it is hereby dismissed.

BY THE COURT,
BIGGS
Chief Judge

Received and filed Mar 5, 1963
IDA O. CRESKOFF
Clerk

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14137

PAUL GINSBURG, Appellant
v.
HORACE STERN and PATRICK N. BOLSINGER

SUR PETITION FOR REHEARING

Present:

BIGGS, Chief Judge, and MCLAUGHLIN, KALODNER, STALEY, GANEY and SMITH, Circuit Judges, and SHERIDAN, District Judge.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

BY THE COURT
BIGGS
Chief Judge

Dated: March 27, 1963.

Received and filed Mar 27 1963.
IDA O. CRESKOFF
Clerk